Supreme Court, U.S.
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No. 04-1111

In The

Supreme Court of the United States

FRANK GABALDON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the government presents no evidence that the victim was held for an appreciable period before she suffered a beating which immediately rendered her unconscious and caused her death, has the government proven the "holding" element of a federal kidnapping charge under 18 U.S.C. § 1201(a) when it does not present any evidence the act of beating her involved any restraint beyond that inherent in her murder?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals, which is published, appears at pages 1a to 17a of the appendix to the petition and is reported at 389 F.3d 1090 (10th Cir. 2004). The judgment of the district court appears at pages 18a to 24a of the appendix to the petition and was unreported.

JURISDICTION

The district court for the District of New Mexico had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. That court issued its opinion and judgment on November 16, 2004.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Kidnapping Act, 18 U.S.C. § 1201(a), provides, in pertinent part:

> Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by a parent thereof, when – . . . (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States . . . shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

STATEMENT OF THE CASE

The United States charged Frank Gabaldon with one count each of first-degree murder, kidnapping resulting in death, and four counts of tampering with a witness in a June 25, 2002 Indictment. (App. 25-27)

The jury acquitted Mr. Gabaldon of first-degree murder, found him guilty of the lesser-included second-degree murder, and guilty of kidnapping resulting in death. The jury acquitted him of the tampering with witness charges. (App. 70-72) The district court sentenced him to life in prison. (App. 73-77)

Mr. Gabaldon, his wife Nicola, and their friend R.C. Begay were driving around in the Gabaldons' car drinking alcohol in Gallup, New Mexico on February 24, 2001 when they picked up Deirdre Dale, a sixteen-year-old Navajo Indian girl. (Pet. App. 3a) Nicola was the driver, Mr. Gabaldon sat in the front passenger seat, and Mr. Begay sat in the back passenger's seat. (Pet. App. 3a) Mr. Gabaldon and Mr. Begay asked Ms. Dale if she wanted to

"party" with them. Ms. Dale agreed, got into the back seat of the car beside Mr. Begay, and began to drink alcohol. (Pet. App. 3a) Mr. Gabaldon was 6'3" and approximately 400 pounds. (Pet. App. 3a) Ms. Dale was 5'2" and weighed 123 pounds. (App. 496)

The Gabaldons, Mr. Begay, and Ms. Dale drove around drinking alcohol and stopping to get more alcohol to drink. (App. 620,731-33) After leaving a store, according to Nicola's trial testimony, Mr. Begay complained to Mr. Gabaldon that Ms. Dale refused to perform a sexual act on Begay. (Pet. App. 3a) Mr. Gabaldon told Mr. Begay to hit Ms. Dale. (Pet. App. 3a) Mr. Begay and then Mr. Gabaldon pummeled Ms. Dale in the face and head. (Pet. App. 3a) Ms. Dale screamed for them to stop. (Pet. App. 3a) The hitting occurred for approximately 30-45 seconds. (App. 749) After the quick but devastating beating concluded, Ms. Dale was knocked unconscious. (Pet. App. 3a) After the hitting stopped, Ms. Dale said nothing further. (App. 749-50)

Mr. Gabaldon instructed Nicola to pull the car over at a particular spot. (Pet. App. 3a) Mr. Gabaldon and Mr. Begay pulled the unconscious Ms. Dale out of the car with the intention of leaving her body. (Pet. App. 3a) They decided not to leave Ms. Dale at that location, and put the unconscious but still breathing Ms. Dale back into the car. (Pet. App. 3a-4a) They resumed driving, and drove through Gallup toward another location on the Navajo Indian Reservation. (Pet. App. 4a)

Ms. Dale "continued to make noises indicating that she was still breathing". (Pet. App. 4a) Mr. Gabaldon provided a shoelace to Mr. Begay and directed Mr. Begay to strangle

Ms. Dale and, when Mr. Begay had trouble, Mr. Gabaldon told Mr. Begay to use another technique. (Pet. App. 4a) After Ms. Dale stopped making noises, Mr. Gabaldon told Mr. Begay to, and Mr. Begay did, remove Ms. Dale's clothes and throw them out of the car. Later, Mr. Gabaldon told Mr. Begay to use a cigarette lighter purchased in Gallup to burn Ms. Dale's fingertips in an effort to destroy any DNA evidence under Ms. Dale's fingernails that could connect Mr. Gabaldon to Ms. Dale's death. (Pet. App. 4a) At a location on the Navajo Indian Reservation, Mr. Begay and Nicola threw Ms. Dale's body into a ravine. (Pet. App. 4a) Ms. Dale's body was found on March 3, 2001. (Pet. App. 4a)

The chief medical investigator for the State of New Mexico, a forensic pathologist, determined Ms. Dale died of blunt force trauma to the head and the .455-.332 levels of alcohol she had "may have contributed somewhat to the death in a person . . . who had a severe head injury." (App. 463,466,475) The ligature did not cause Ms. Dale's death but likely helped hasten her death. (App. 484-85) Ms. Dale died during the time when she was probably actively drinking. (App. 513)

The United States' closing argument focused on the murder and the conduct which is the basis for the determined cause of her death and purported kidnapping. (App. 1139-53) The prosecutor struggled to argue that the quick, murderous pummeling constituted the confinement and holding required for conviction. (App. 1154) Initially the prosecutor conceded, regarding how the defendants possibly benefitted by holding the victim, "Well, this isn't that sort of kidnaping, for some benefit." (App. 1154) Shortly thereafter, the prosecutor argued that the defendants

gained some benefit because they "brought her in that car and plowed her with alcohol". (App. 1154-55)

Defense counsel cautioned the jury about the potential sweeping scope of kidnapping: "The [United States'] argument is that, while she was unconscious or even conscious after she got hit the first time, probably she didn't want to be there. That's it," argued defense counsel. "What that means is anybody that gets hit or struck and then later dies because of something that happens to them [the defendant] is guilty of kidnaping resulting in death?" (App. 1176) Defense counsel concluded, "This is a murder case, not a kidnap case." (App. 1176)

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE ACKNOWLEDGED CIRCUIT SPLIT REGARDING THE INTERPRETATION OF THE HOLDING ELEMENT OF OFFENSES UNDER THE FEDERAL KIDNAPPING STATUTE

The Court should grant review to resolve the significant circuit split on an essential element of the federal kidnapping statute, 18 U.S.C. § 1201(a).[1] The opinion of the Tenth Circuit Court of Appeals conflicts with the

[1] In *United States v. Lentz*, No. 04-8107, Mr. Lentz filed a currently pending petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit from *United States v. Lentz*, 383 F.3d 191 (4th Cir. 2004). That petition, filed on January 10, 2005, includes this same issue.

Third, Ninth, and the Eleventh Circuits as to the element that requires the defendant "hold" the victim as part of the offense. As to this element, the Tenth Circuit did not adopt the test applied by the Third, Ninth and Eleventh Circuits. Then the Tenth Circuit, even if the test did apply, more broadly construed the offense than the Third, Ninth and Eleventh Circuits. Thus, the confluence of the Tenth Circuit's departure on this element provides for an exponentially broader sweep of conduct covered by the federal kidnapping statute under the jurisdiction of the United States Court of Appeals for the Tenth Circuit than the jurisdictions of the Third, Ninth and Eleventh Circuit Courts of Appeal. It is respectfully submitted that review should be granted so that application of the important federal statute, for which Mr. Gabaldon received a mandatory sentence of life in prison, is applied in a more uniform manner.

Congress enacted the federal kidnapping statute in 1932 to "stamp out [the] growing and sinister menace" of kidnappings where perpetrators would snatch a victim and then transport the victim across state lines. *Chatwin v. United States*, 326 U.S. 455, 463 (1946). In such an act, there is both accompanied travel and a clear holding of the victim. As the statute now stands, in a federal kidnapping prosecution where the charge is kidnapping resulting in death, the government must prove the substantive elements that (1) victim was unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away; (2) victim was held "for ransom or reward or otherwise"; and (3) victim's death resulted from the seizing and holding for some benefit. 18 U.S.C. § 1201(a); *Lentz*, 383 F.3d at 200.

The circuit split raised by this case is over whether proof of a crime of violence against the victim alone is sufficient to establish the holding element of the kidnapping offense or whether the government must present some evidence of a holding not intrinsic in the crime of violence itself.[2] The Court should therefore grant review of this case because it presents an opportunity to resolve this conflict.

An element of the Federal Kidnapping Act is "holding a kidnapped person for a proscribed purpose," which "necessarily implies an unlawful physical or mental restraint for an appreciable period against the person's will and with a willful intent so to confine the victim." *Chatwin*, 326 U.S. at 460. "The 'holding' or 'detention' element is separate and distinct from the 'kidnapping' or 'seizure' element, but they should not be viewed in a vacuum." *Lentz*, 383 F.3d at 204.

The Tenth Circuit panel below held that, contrasted with the more ordinary kidnapping case involving a testifying victim, where the victim died and cannot testify but the evidence shows "the accused feloniously interfered with the victim's ability to form or express a desire to leave, the jury could rationally conclude that the victim was being held involuntarily." *Gabaldon*, 389 F.3d at 1095; Pet. App. 7a. The Tenth Circuit cited "additional evidence that Dale resisted her assailants and shouted for them to stop beating her before she was rendered unconscious."

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[2] This Court has not examined the meaning of the element of holding since *Chatwin* in 1946. The Court has reviewed the statutory terms identifying the purpose of the holding element – for ransom, reward, or otherwise – in *Gooch v. United States*, 297 U.S. 124, 128-29 (1936), and *United States v. Healy*, 376 U.S. 75, 81 (1964).

Gabaldon, 389 F.3d at 1095; Pet. App. 8a. The panel recognized that the Tenth Circuit "has yet to take a position either adopting or rejecting the *Berry* test." *Gabaldon*, 389 F.3d at 1097; Pet. App. 12a. "Although we find much in the *Berry* test to commend its use in a § 1201(a)(2) situation, we do not need to decide in this case whether formally to adopt the *Berry* test," the Tenth Circuit held. "Here the evidence clearly established kidnapping as a separate crime even if we were to adopt the *Berry* test." *Gabaldon*, 389 F.3d at 1097; Pet. App. 12a.

The Tenth Circuit found, "Gabaldon concedes that he held Dale longer than would have been minimally necessary for her to be murdered as he acknowledged in his appellate brief that they drove around with Dale while 'deciding what to do with her.'"[3] *Id.*, at 1098; Pet. App. 13a. "Gabaldon decided to continue transporting the unconscious and battered Dale in his car, not just because he wanted to kill her, but because he wanted to avoid arrest and prosecution on battery charges."[4] *Gabaldon*, 389 F.3d at 1098; Pet. App. 13a.

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[3] Mr. Gabaldon made no such concession. He merely conceded that after inflicting the cause of death the assailants drove around deciding what to do with her. The only evidence of the cause of death, according to the government's forensic pathologist, was blunt force trauma to the head. That forensic pathologist also testified that Ms. Dale's death probably occurred while she was still actively drinking. The initial beating occurred while Ms. Dale was drinking. There was no credible evidence that Dale either drank any alcohol or regained consciousness after the initial beating.

[4] The United States, however, never argued this point to the jury. Instead, the United States argued that there was no benefit to the defendants (App. 1154) and then argued that the only benefit was they "plowed her with alcohol" (App. 1154-55).

The panel's conclusion that this evidence nevertheless established the holding element is in conflict with several other courts of appeal that have held that unlawful confinements or movements associated with other felonies do not satisfy the holding element of kidnapping unless the holding is more than what was required to complete the related felony.

Specifically, the Third, Fourth, Ninth, and Eleventh Circuits have addressed the issue of the relationship of detention or holding in kidnapping cases to related criminal acts, and agreed – unlike the decision below in the Tenth Circuit – that the evidence must establish a holding or detention greater than the minimum necessary to accomplish the related felony. *See Government of Virgin Islands v. Berry*, 604 F.2d 221 (3d Cir. 1979); *see also United States v. Lentz*, 383 F.3d 191 (4th Cir. 2004); *United States v. Etsitty*, 130 F.3d 420, 429 (9th Cir. 1997) (explaining that "the holding must be more than an incidental part of some other crime or attempt"[5] otherwise "treating the seizure and confinement of the victim as kidnapping would exceed the scope of the statute"); *United States v. Howard*, 918 F.2d 1529, 1535 (11th Cir.), *cert. denied*, 500 U.S. 943 (1991) (reversing convictions where evidence of holding or detention was based on holding involved in robbery of victim, noting robbery almost invariably involves a brief detention of the victim).

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[5] The Supreme Court of New Mexico adopted this distinction in *State v. Baca*, 902 P.2d 65, 75 (N.M. 1995) and *State v. Vernon*, 867 P.2d 407, 411 (N.M. 1993), wherein the court found that incidental movement of a victim to a remote location for the purpose of facilitating a murder or "reducing evidence" did not by itself constitute kidnapping and required the kidnapping charge be dismissed on remand.

The Third Circuit established a four-part test, which the Eleventh Circuit adopted, to distinguish kidnapping from other offenses involving asportation or detention of a victim: (1) the duration of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation which occurred is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense. *Berry*, 604 F.2d at 227; *Howard*, 918 F.2d at 1535.[6]

In *Berry*, the victim voluntarily accompanied the defendants on a short drive based on their promise to take him home. The defendants then forced the victim from the car and robbed him. The court recognized the "danger" of considering kidnapping when other violent crimes occurred "which inherently involve the temporary detention or seizure of the victim". *Berry*, 604 F.2d at 226. The court contrasted the holding "not of 'particularly long duration'" with "the traditional kidnapping case, in which the victim

[6] In *United States v. Peden*, 961 F.2d 517, 522 (5th Cir.), *cert. denied*, 506 U.S. 945 (1992), the Fifth Circuit found it "unnecessary to decide whether to adopt the *Berry* test" because the facts there "survive[] the test." The court found that the victim was aware that the defendant was not transporting her for the agreed-upon purpose, unlike the *Berry* victim, and the holding "went beyond that necessarily inherent in rape. As the government stated in oral argument, there would be no kidnapping if, for example, Peden had merely taken M.N. off to the bathroom at the skating rink and had raped her there."

is held for a substantial period of time."[7] *Berry*, 604 F.2d at 228. The court held that because the victim was confined to no greater extent than the confinement inherent in the crimes of robbery and assault, there was insufficient evidence to establish the crime of kidnapping.[8] *Id.* at 227-29.

A similar result was reached by the Eleventh Circuit in *Howard*. In that case, the defendants attempted to confine a DEA agent in a car for the purpose of taking his keys to steal "buy" money locked in the trunk of his car.

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[7] In *United States v. Lowe*, 145 F.3d 45, 52 (1st Cir.), *cert. denied*, 525 U.S. 918 (1998), the First Circuit considered the defendant's *Berry* argument but found that the victim was held for six hours, which made the kidnapping conviction not merely incidental to the Mann Act conviction.

[8] In contrast, an example of a case where evidence related to a murder would be appropriate to support a kidnapping charge is found in *United States v. Sarracino*, 131 F.3d 943, 944-45 and 947 (10th Cir. 1997), upon which the panel below heavily relied. *Gabaldon*, 389 F.3d at 1095-96; Pet. App. 9a. The defendant in *Sarracino* appealed his convictions for second degree murder and kidnapping of victim Julius Brown. *Sarracino*, 131 F.3d at 945. The defendants in *Sarracino* put the battered and stabbed conscious victim into a vehicle on the false premise that the attackers were taking the victim to the hospital. Brown was not taken to the hospital but instead was driven while alive to a remote location where the previous attackers beat him again, pushed him off a cliff, threw rocks at him, piled more and larger rocks on him, and cut his throat. The Tenth Circuit recognized that the cause of Brown's extremely prolonged death was "the sum total of his injuries." *Id.* The Tenth Circuit held, "Moving a victim to continue a beating in a more secluded location and to prevent the detection satisfies the statute." The murder of Brown occurred as a result of the kidnapping, and the kidnapping occurred prior to the cause of death. *Id. See also United States v. Fernandez*, 797 F.2d 943, 951 (11th Cir. 1986), *cert. denied*, 483 U.S. 1006 (1987) (upholding convictions for both kidnapping and murder where the holding served several purposes separate and apart from the killing).

The court recognized it "cannot imagine that Congress intended to subject a robbery defendant to additional liability for kidnapping unless the detention was somehow excessive in relation to the underlying robbery." *Howard*, 918 F.2d at 1535. The court recognized that since 1984, when jurisdiction for federal cases enlarged to include kidnapping not involving interstate transport, "Congress has forced the courts to analyze the statutory definition of kidnapping in the context of related criminal activities." *Id.*, at 1534. The court recognized that most violent crimes "involve at least a momentary detention of the victim" and did not believe that Congress intended "additional liability for kidnapping unless the detention was somehow excessive in relation" to the underlying violent crime.[9] *Id.*, at 1535. "The central problem in the law of kidnapping is to restrict the drastic sanctions authorized for this offense to instances of misbehavior warranting such punishment." *Id.* (quoting Model Penal Code § 212.1, comment 2, at 220 (1980)). The *Howard* Court recognized that it "requires an abundance of judicial discretion to limit its application to appropriate circumstances."[10] *Howard*, 918 F.2d at 1535.

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[9] Many state courts have likewise adopted this distinction. *See, e.g., Russell v. State*, 874 So.2d 1256, 1258 (Fla. App. 2004); *State v. Smith*, 669 N.W.2d 19, 32 (Minn. 2003); *Cuevas v. State*, 338 So.2d 1236, 1238 (Miss. 1979); *State v. Hall*, 599 S.E.2d 104, 109 (N.C. App. 2004); *State v. Fulcher*, 243 S.E.2d 338, 351 (N.C. 1978); *Brown v. Commonwealth*, 337 S.E.2d 711, 713 (Va. 1985); *Johnson v. Commonwealth*, 275 S.E.2d 592 (Va. 1981).

[10] The Eleventh Circuit, relying on *Howard*, found that the defendant inveigled the victim in Florida to travel to Georgia, then killed the victim and stole the victim's car and personal items in Georgia, which involved "more than inherent aspect of the murder and thefts occurring in Georgia." *United States v. Boone*, 959 F.2d 1550, 1552-53 & 1556 n.6 (11th Cir. 1992).

The court adopted the *Berry* test and reversed defendants' convictions for kidnapping. *Howard*, 918 F.2d at 1535-37.

In *Etsitty*, the defendant had chased the victim on his horse, roped her around the neck, and engaged in an extended struggle with her during which he assaulted her and tore at her shirt. *Etsitty*, 130 F.3d at 423. The Ninth Circuit did not mention or consider the *Berry* test, but the panel majority instead relied on a double jeopardy analysis. *Etsitty*, 130 F.3d at 427. The court, however, did find that the "substantial period of time" during which the defendant held the victim "for the purpose of causing her considerable bodily and emotional harm" satisfied the *Chatwin*-based limitation of liability for kidnapping. *Etsitty*, 130 F.3d at 427. The panel minority concurred because, despite Congress' intent to limit the application of the kidnapping statute, defendant seized and held the victim for an appreciable period to time, and the holding was more than an incidental part of the other crime or attempt. *Etsitty*, 130 F.3d at 429 (Kleinfeld, J., concurring).

The Fourth Circuit panel majority in *Lentz* recognized that it was required to determine whether the alleged decedent "was 'held'" by the defendant "after she arrived at his house but before the fatal wounds were inflicted." *Lentz*, 383 F.3d at 203.[11] In fact, the court found that the unknown evidence supported the finding that the victim

[11] *Lentz* involved unknown circumstances surrounding the death of defendant's ex-wife which contrast with the circumstances and cause of Ms. Dale's death in the present case. Each case involves the same basic challenge under the *Berry* test, but each under different factual circumstances.

"was held and killed *after* Lentz tricked her" into interstate travel to his house. *Id.*, at 204 (Italics in original). "For similar reasons," the court summarily "reject[ed] . . . that the evidence . . . cannot suffice to establish a 'holding' of Doris under the Act because it demonstrates no more than a holding incident to her murder." *Id.*, at 204.[12]

These cases demonstrate that the weight of authority establishes, when the holding element of a federal kidnapping charge rests on detention connected to a murder or any other crime or violence, the detention must be greater than necessary for the murder or crime of violence. *See* Wayne R. LaFave, *Substantive Criminal Law,* §§ 18.1(b) and (c) at 11-19 (2d ed. 2003).

In this case, the record contained no evidence of a detention greater than necessary for a crime of murder. *Gabaldon*, 389 F.3d at 1095; Pet. App. 7a ("feloniously interfered with the victim's ability to form or express a desire to leave").

Where the evidence is that the cause of death caused the holding for kidnapping, the government did not present evidence of holding under the Federal Kidnapping Act. That lack of evidence, plus the immediacy of the brutal beating, fails to meet the definition of holding that

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[12] The dissent in *Lentz* was based on the lack of any evidence from which a holding could be reasonably inferred and the lack of evidence satisfying the *Chatwin* requirement of a holding "for an appreciable period". *Lentz*, 383 F.3d at 223-25 (Michael, J., dissenting). The dissent acknowledged, citing to *Chatwin*, Judge Kleinfeld's concurrence in *Etsitty*, *Howard*, and *Berry*, that if the defendant had killed the victim as soon as she arrived at his residence, the defendant "did not hold her for the appreciable period necessary for a federal kidnapping." *Lentz*, 383 F.3d at 226 (Michael, J., dissenting).

this Court provided in *Chatwin* because it fails to establish that the holding was for an appreciable period of time. *See Lentz*, 383 F.3d at 223. The decision below therefore is wrongly decided and conflicts with decisions of the Third, Ninth, and Eleventh Circuits. Accordingly, this Court should grant certiorari to resolve the conflict.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 11, 2005

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRANK GABALDON, Defendant-Appellant.	No. 03-2233

Appeal from the United States District Court for the District of New Mexico (D.C. No. CR-02-1056-WJ)

(Nov. 16, 2004)

Ray Twohig, Ray Twohig, P.C., Albuquerque, New Mexico (Todd Hotchkiss, Frechette & Associates, P.C., Albuquerque, New Mexico, with him on the briefs), for Defendant-Appellant.

James Miles Hanisee, Assistant United States Attorney (David C. Iglesias, United States Attorney, and Fred Chris Smith, Assistant United States Attorney, with him on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

Before **EBEL** and **TYMKOVICH**, Circuit Judges, and **HEATON**, District Judge*.

EBEL, Circuit Judge.

Defendant Frank Gabaldon appeals his conviction under the federal kidnapping statute, 18 U.S.C. 1201(a), arguing that the verdict was not supported by sufficient evidence that he held his victim against her will, that her confinement was not merely incidental to her eventual murder, or that holding her provided a benefit to Gabaldon. He also challenges the district court's *Daubert* ruling, which excluded the testimony proffered by a defense expert who held himself out as an accident reconstructionist and who sought to testify, among other things, that Gabaldon would have been physically incapable of striking his victim as alleged by the prosecution.

We find that the evidence was sufficient to support Gabaldon's conviction and that the district court did not abuse its discretion in excluding the defense's expert witness. We therefore exercise jurisdiction pursuant to 28 U.S.C. § 1291 and AFFIRM.

I. Background

The evidence at trial presented the following narrative of the crime for which Gabaldon was convicted:

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* Honorable Joe Heaton, District Court Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

Frank Gabaldon, a large man at 6'3" and approximately 400 lbs., was riding around the town of Gallup, New Mexico while consuming alcohol in his car on February 24, 2001, accompanied by his wife Nicola and his friend R.C. Begay. Nicola was driving the Gabaldons' 1996 Buick LeSabre, Frank Gabaldon was in the front passenger seat, and Begay was in the back seat on the passenger's side of the vehicle. In the course of their drive they came across Deirdre Dale, a sixteen-year-old Navajo Indian girl, and asked her if she wanted to "party" with them. Dale agreed, got into the back seat of Gabaldon's car, and began to drink.

The group then drove to a liquor store and purchased more alcohol. After leaving the store, a dispute erupted in the back seat between Dale and Begay over Dale's refusal to perform a sexual act on Begay. According to Nicola's testimony at trial, after Begay complained out loud to Gabaldon that Dale had rebuffed him, Gabaldon told Begay to "hit that bitch." Begay began hitting Dale, and Gabaldon turned around in his front passenger's seat, reached into the back of the car, and joined Begay in striking Dale in the face and head. Dale shouted for her assailants to stop, to no avail, and ultimately she was knocked unconscious.

After the beating was over, Gabaldon directed his wife to pull the car over at a highway turn-off, where Gabaldon and Begay pulled the unconscious Dale out of the car, intending to leave her there at a location within a quarter mile of the road. Gabaldon and Begay decided not to leave Dale at that location, however, out of concern both that she would be discovered too quickly, and that Dale's fingers, which had scratched Gabaldon during the struggle in the car, might have samples of Gabaldon's DNA. They placed

Dale, unconscious but still breathing, back into the car and drove through the town of Gallup and beyond toward a deserted spot on the Navajo Indian Reservation.

Along the way, Gabaldon gave Begay a shoe lace, and instructed Begay to strangle Dale. When Dale continued to make noises indicating she was still breathing in spite of Begay's attempts to strangle her, Gabaldon instructed Begay in the proper technique. After Dale finally fell silent, Gabaldon instructed Begay to remove Dale's clothes and throw them out of the car. Begay complied. Later, again at Gabaldon's behest, Begay used a cigarette lighter purchased in Gallup on their way to the reservation to burn Dale's fingertips in the hopes that this would destroy any DNA evidence that might lead back to Gabaldon. Upon arriving at their destination on the Navajo Reservation, Begay and Nicola Gabaldon threw Dale's body into a ravine, where she was found on March 3, 2001.

Gabaldon was charged with first degree murder, kidnapping resulting in death, and witness tampering on June 25, 2002. A superceding indictment entered on February 12, 2003 added three charges of witness tampering. Seven days before Gabaldon's trial was scheduled to begin, the defense gave notice that it planned to introduce expert testimony from Dr. Alan Watts. Dr. Watts's report was submitted the next day, on June 3, 2003, and the government requested a *Daubert* hearing on June 6th. That hearing was held after selection of the petit jury on June 9, 2003. The government challenged all nine conclusions contained in Dr. Watts's report as beyond his expertise and as unsupported by scientific methodology. The district court agreed, and excluded Dr. Watts's testimony in its entirety.

After a five-day trial, the jury convicted Gabaldon of second-degree murder and kidnapping resulting in death, and acquitted him of the witness-tampering charges. Gabaldon now appeals his conviction on the kidnapping count.

II. Sufficiency of Evidence

We review *de novo* claims that the evidence presented at trial was insufficient to support a conviction. *United States v. Walker*, 137 F.3d 1217, 1220 (10th Cir. 1998). Evidence is sufficient to support a conviction if the evidence and the reasonable inferences drawn therefrom, viewed in the light most favorable to the government, would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt. *Id.* Our review is very deferential; we will not overturn a jury's verdict unless no reasonable juror could have concluded, on the basis of the evidence presented, that the defendant was guilty of the crime charged. *Id.*

The provision of the federal kidnapping statute under which Gabaldon was convicted reads as follows:

> Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . when –
>
> . . .
>
> (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;
>
> . . .

> shall be punished by imprisonment . . . and, if the death of any person results, shall be punished by death or life imprisonment.

18 U.S.C. § 1201(a).

Our cases have interpreted this statute to require, *inter alia,* that the victim be (1) held against his or her will (2) for some benefit to the captor. *See Walker,* 137 F.3d at 1220 (setting forth the requirements for conviction under § 1201(a)(1), which criminalizes willful interstate transportation of a kidnapped person); *United States v. Toledo,* 985 F.2d 1462, 1467 (10th Cir. 1993) ("[T]he involuntariness of the seizure and detention is the very essence of the crime of kidnapping.") (quoting *Chatwin v. United States,* 326 U.S. 455, 464 (1946)) (emphasis in *Toledo* omitted); *United States v. Sarracino,* 131 F.3d 943, 947 (10th Cir. 1997) (finding the statutory requirement that the kidnapping be done "for ransom or reward or otherwise" satisfied where "the kidnappers had some reason for the kidnapping, which, to them, would be of some benefit").[1]

---

[1] Our opinion in *Walker* also listed a requirement that the acts constituting kidnapping be done "knowingly and willfully." 137 F.3d at 1220. This requirement, however, is unique to the statutory language criminalizing interstate transportation of a kidnapped person. 18 U.S.C. § 1201(a)(1). We subsequently held in *United States v. Jackson* that, while the insertion of the word "willfully" in § 1201(a)(1) "may require specific intent" on the part of the accused, that term's absence in other subsections of the statute indicated that other types of kidnapping covered by the statute remained general intent crimes. 248 F.3d 1028, 1031-32 (10th Cir. 2001). *Accord United States v. Sneezer,* 983 F.2d 920, 922-23 (9th Cir. 1992) (holding that the kidnapping crime defined in § 1202(a)(2) is a general intent crime).

A. Whether Dale was held against her will

Gabaldon first challenges his conviction by arguing that the evidence did not show Dale was held against her will, citing her voluntary entry into Gabaldon's car. According to Gabaldon, Dale's confinement in his vehicle once she had been beaten unconscious was not "against her will," since at that point she was no longer capable of formulating or expressing a will.

In an ordinary kidnapping case where the victim is able and willing to testify as to his or her consent at trial, testimony that "he or she was transported involuntarily is . . . normally sufficient to support a jury finding that the victim was in fact transported involuntarily." *United States v. Hernandez-Orozco,* 151 F.3d 866, 869 (8th Cir. 1998). Where, by contrast, the victim's testimony is not available at trial but the evidence introduced indicates that the accused feloniously interfered with the victim's ability to form or express a desire to leave, the jury could rationally conclude that the victim was being held involuntarily.

The evidence presented below indicated that Dale was beaten into unconsciousness while sitting in the back of Gabaldon's car. It would have been entirely reasonable on this basis alone for the jury to have concluded that Dale would have withdrawn any previous consent to stay.[2] Here,

---

[2] *Cf. United States v. Applewhaite,* 195 F.3d 679 (3d Cir. 1999). *Applewhaite* involved a sufficiency of the evidence challenge to a conviction under the Virgin Islands kidnapping statute, which, like the federal statute, requires a kidnap victim to be held against his will. The victim in that case was the target of a murder conspiracy, which began with him being clubbed into unconsciousness from behind and loaded into a van. The Third Circuit held that the jury was justified in

(Continued on following page)

in any case, the prosecution produced additional evidence that Dale resisted her assailants and shouted for them to stop beating her before she was rendered unconscious. We conclude that the evidence at trial was sufficient to support the jury's conclusion that Dale was confined in Gabaldon's car against her will.

B. Whether Gabaldon held Dale for a "benefit"

Gabaldon next claims that the evidence was insufficient for the jury to have concluded beyond a reasonable doubt that he held Dale for any benefit. Our cases interpreting the statutory requirement that the victim be held "for ransom or reward or otherwise," however, have repeatedly observed that the statute demands only that the holding of the kidnap victim fulfill some "purpose desired by the captor." *De Herrera v. United States,* 339 F.2d 587, 588 (10th Cir. 1964); *Sarracino,* 131 F.3d at 947. *See also Walker,* 137 F.3d at 1220 (finding the accused's holding of his victim in order to have the opportunity to convince her to remain in a relationship with him to be a sufficient "benefit"); Diane M. Allen, Annotation, *Requirement, Under Federal Kidnapping Act (18 U.S.C. § 1201(a)), that Person be Held "for ransom or reward or otherwise",* 71 A.L.R. FED. 687, 690-92 (2004) (summarizing rule that statutory language "or otherwise" can be satisfied by showing the victim was held for any purpose or benefit to the accused).

---

concluding that the driver of the van did not intend to take his unconscious victim to the local hospital, and that the victim was therefore confined against his will. *Id.* at 691.

In *Sarracino,* the victim of a prior battery was induced to get into a car with the promise that he would be taken to the hospital, only to have his former assailant take control of the vehicle, drive the victim to a remote area, and kill him. On these facts, similar to the case now before us, we found the very lax benefit requirement was met where the victim's assailants "benefited, in terms of seclusion and a higher chance of secrecy, by moving [the victim] to the lonely mountain where they continued to beat him and then left him to die." 131 F.3d at 947. Given the evidence presented in that case, we held that a reasonable jury could infer that the defendants "wished to dispose of [the victim] in a location where a body was unlikely to be detected." *Id.*

The same principles are squarely applicable here. The government introduced evidence at trial that Gabaldon decided not to leave Dale where he and Begay first took her out of the car out of fear that Dale would be found too quickly. Keeping Dale in the car also gave Gabaldon the opportunity not only to kill her, thereby eliminating the possibility that she would identify him as one of her assailants in the initial beating, but also to try to eliminate evidence tying him to the battery and subsequent murder by having Begay burn Dale's fingers to destroy any of Gabaldon's DNA that might have been deposited there. We find, therefore, that there was sufficient evidence from which a reasonable jury could conclude that Gabaldon benefitted from transporting Dale in his vehicle, both because it provided greater secrecy in disposing of her, and because it gave him a chance to destroy evidence that would incriminate him.

C. Whether Gabaldon's confinement of Dale was merely incidental to her murder

Gabaldon also argues that the evidence at trial failed to show that Dale's confinement was anything more than a merely incidental part of her murder. He bases his argument on the Third Circuit's decision in *Government of the Virgin Islands v. Berry,* where the court overturned a conviction under the Virgin Islands' territorial kidnapping statute on the grounds that the victim's confinement had been purely incidental to his robbery and therefore did not amount to an independent confinement that could justify a kidnapping conviction. 604 F.2d 221, 228 (3d Cir. 1979).

The *Berry* court based its analysis on state courts' interpretation of state kidnapping statutes, under which the crime of kidnapping was not said to have occurred if the seizure or asportation of the victim was "merely incidental to the commission of other substantive crimes." *Id.* at 227 (quotation omitted). The concern motivating both the *Berry* court and the state courts on which it relied was that a too-literal application of the kidnapping statute would permit overzealous prosecutors to charge those suspected of relatively minor crimes involving some degree of restraint or asportation with the much more serious crime of kidnapping. *Id.* at 226-27. In order to avoid this difficulty, the Third Circuit adopted a four-factor test for distinguishing crimes for which kidnapping charges are justified from those where they are not, listing the factors as:

> (1) the duration of detention or asportation;
>
> (2) whether the detention or asportation occurred during the commission of a separate offense;

> (3) whether the detention or asportation which occurred is inherent in the separate offense; and
>
> (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense.

Id. at 227.

The *Berry* test has not been widely adopted by other Circuits, a fact that may be a natural result of the fact that most federal kidnapping cases involve § 1201(a)(1), which criminalizes the interstate transportation of an abducted person. *See United States v. Jones,* 808 F.2d 561, 565-66 (7th Cir. 1986) (rejecting as "wholly irrelevant" the argument that an interstate kidnapping was merely incidental to the interstate transportation of a woman for an "immoral purpose" in violation of the Mann Act, on the grounds that kidnapping and Mann Act offenses were "distinct and separately punishable"); *United States v. Lowe,* 145 F.3d 45, 52 (1st Cir. 1998) (same). An abduction or seizure that involves enough distance traveled and time elapsed in order for the captor and the victim to cross state lines will generally constitute a bona fide kidnapping. Where, as here, the statute requires only that a seizure or restraint take place within the special territorial jurisdiction of the United States, the difficulty highlighted by the *Berry* court is more likely to arise.

The Eleventh Circuit recognized this problem in *United States v. Howard,* where it confronted a case in which defendants challenged their convictions for attempting unlawfully to detain a DEA agent in violation of § 1201(a)(5), on the grounds that the attempted seizure was merely incidental to their crime of attempted robbery. 918 F.2d 1529, 1534 (11th Cir. 1990). Adopting the *Berry*

test, the Eleventh Circuit invalidated the attempted kidnapping convictions, finding the evidence insufficient for a reasonable jury to have concluded beyond reasonable doubt that defendants planned to detain their victim for longer than necessary to rob him or that their limited detention of the DEA agent exceeded what would have been inherently necessary for a successful robbery. *Id.* at 1536-37. *See also United States v. Etsitty,* 130 F.3d 420, 428-29 (9th Cir. 1997) (Kleinfeld, J., concurring) (arguing that § 1201(a)(2) requires a seized or confined person to be held for an appreciable period, beyond what would be required for an assailant simply to attempt a sexual assault).

Our Circuit has yet to take a position either adopting or rejecting the *Berry* test.[3] Although we find much in the *Berry* test to commend its use in a § 1201(a)(2) situation, we do not need to decide in this case whether formally to adopt the *Berry* test. Here, the evidence clearly established kidnapping as a separate crime even if we were to adopt the *Berry* test. *Cf. United States v. Peden,* 961 F.2d 517, 522-23 (5th Cir. 1992) (recognizing the problems the

---

[3] The issue was raised in *Sarracino* as part of the defendant's argument that he did not abduct his victim for any "ransom or reward or otherwise." We held that the evidence was sufficient for the jury to conclude that Sarracino derived an independent benefit from detaining and moving his victim to a deserted locale, without addressing the claim that the victim's transportation was incidental to his murder. 131 F.3d at 947. And, in *United States v. Cassidy,* we rejected an overbreadth and vagueness challenge to a conviction under § 1201(a)(2) for a federal prison inmate who held two prison guards captive for ten hours in the course of a failed escape attempt. 571 F.2d 534, 537 (10th Cir. 1978). Although the defendant had seized his guards in order to advance his escape efforts, their ten hours' detention left little room for any claim that the seizure was merely an incidental part of the crime of attempted escape.

Berry test was meant to address, but declining to adopt or reject that test where its test requirements would have been met on the facts of the case). Gabaldon concedes that he held Dale longer than would have been minimally necessary for her to be murdered as he acknowledged in his appellate brief that they drove around with Dale while "deciding what to do with her." What is more, the jury was presented with ample evidence to support a conclusion that Gabaldon decided to continue transporting the unconscious and battered Dale in his car, not just because he wanted to kill her, but because he wanted to avoid arrest and prosecution on battery charges.

The evidence presented at trial was sufficient for a reasonable jury to have concluded beyond a reasonable doubt that Gabaldon held Dale against her will for a purpose or benefit he desired, and that her confinement was not merely an inconsequential and inherent side-effect of her murder. We therefore reject Gabaldon's sufficiency of evidence claims.

III. *Daubert* Issue

Gabaldon also contends that the district court erred in excluding the testimony proffered by the defense expert, Dr. Alan Watts. We disagree.

Admission at trial of expert testimony is governed by Fed. R. Evid. 702, which imposes on the district court a gatekeeper function to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). The touchstone for relevance, in this context, is whether "the evidence or testimony [will] assist the trier of fact to understand the evidence or to determine

a fact in issue." *Id.* at 591 (quotation omitted). For expert testimony to be reliable under *Daubert,* it "must be based on scientific knowledge, which 'implies a grounding in the methods and procedures of science' based on actual knowledge, not 'subjective belief or unsupported speculation.'" *Dodge v. Cotter Corp.,* 328 F.3d 1212, 1222 (10th Cir. 2003) (quoting *Daubert,* 509 U.S. at 590) (internal quotation marks omitted). The *Daubert* Court provided a non-exclusive list of four factors that may guide the district court's decisionmaking:

> (1) whether the opinion at issue is susceptible to testing and has been subjected to such testing;
>
> (2) whether the opinion has been subjected to peer review;
>
> (3) whether there is a known or potential rate of error associated with the methodology used and whether there are standards controlling the technique's operation; and
>
> (4) whether the theory has been accepted in the scientific community.

Dodge, 328 F.3d at 1222.

The district court's decision to admit or exclude expert testimony under the *Daubert* standard is reviewed on appeal for abuse of discretion. *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 138-39 (1997). The district court's discretion in this area is broad, "both in deciding how to assess an expert's reliability, including what procedures to utilize in making that assessment, as well as in making the ultimate determination of reliability." *Dodge,* 328 F.3d at 1223. We will not overturn the trial court's ruling on admissibility "unless it is arbitrary, capricious, whimsical or manifestly unreasonable or when we are convinced that

the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* (quoting *Atlantic Richfield Co. v. Farm Credit Bank of Wichita,* 226 F.3d 1138, 1163-64 (10th Cir. 2000)) (internal quotation marks omitted).

Of the nine opinions set forth in the defense expert's report to the court, only numbers three and four arguably relied on some mathematical reasoning or Dr. Watts's expertise in accident reconstruction. Conclusion number three relied on a series of force and impact calculations to conclude that "even an 'average size' person" could have delivered the blows to Dale's face and head, since none of her facial bones were broken. The point of this testimony, by Watts's own admission, was to show that the blows to Dale's face need not have been delivered by the 6'3", 400 lb. Gabaldon, but could have been inflicted just as well by his accomplice Begay, who was seated next to Dale in the back of the car.

Although the district court excluded this conclusion as unhelpful to the jury because it was "not scientific and f[e]ll into the category of speculation," the larger problem is that this conclusion is utterly obvious and is not something for which expert testimony is needed. As Watts conceded on the stand, the average juror would know that a woman of Dale's size could be hit by a man smaller than Gabaldon in such a way as not to break her facial bones. Watts's calculations might have been relevant if the conclusion reached was that Gabaldon could *not* have delivered the blows to Dale's face; his conclusion that Begay could not be ruled out is of no help to the jury, especially where Begay admitted at trial that he had in fact struck Dale. The district court did not abuse its

discretion in excluding this piece of the expert's proffered testimony.

Watts's fourth conclusion stated that the internal geometry of Gabaldon's car would have made it difficult for him to reach Dale to deliver the blows that knocked her unconscious and ultimately contributed to her death. Watts claimed this statement relied on published data on the 1996 Buick LeSabre, to calculate the distance between the front seat and the far corner of the rear seat and to find that Gabaldon would have had to lean back between the two front seats to reach Dale with his blows. Watts then asserted that the act of leaning back and holding on to the front seat would have prevented Gabaldon from striking Dale with much force, but offered no scientific support for that statement.

The district court did not abuse its discretion in excluding this conclusion as lacking in "sufficient methodology and reasoning." Watts's opinion about Gabaldon's effective reach and ability to land forceful blows while holding on to the front seat back was entirely conclusory and unsupported by any scientific evidence or reasoning. Watts conceded that his theory could have been tested by placing Gabaldon in a 1996 LeSabre and taking measurements, but no such testing was done.

The remaining seven conclusions offered by Dr. Watts were either speculative, simply restated the contents of the autopsy reports, or dealt with subjects that required the expertise of a pathologist or a toxicologist – expertise that Watts did not have.

We find that the district court acted well within its discretion in excluding Watts's proposed "expert" testimony under *Daubert*.

IV. Conclusion

We find that the evidence presented at trial was sufficient to convict Gabaldon under the federal kidnapping statute. We also find the district court's decision to exclude the defense expert's proffered testimony was a legitimate exercise of its discretion. Gabaldon's kidnapping conviction is therefore AFFIRMED.

September 26, 2003 04:39:PM

United States District Court
District of New Mexico
Summary Document Verification*

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Title:	USA v. Gabaldon, et al.
Document Type:	Judgment in a Criminal Case
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UNITED STATES DISTRICT COURT

District of New Mexico

UNITED STATES OF AMERICA **V.** **Frank Gabaldon**	**Judgment In A Criminal Case** (For Offenses Committed On or After November 1, 1987) Case Number: 1:02CR01056-001WPJ Defense Attorney: Ray Twohig (Retained)

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court:

☒ was found guilty on count(s) I and II after a plea of not guilty

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. Sec. 1111	Second Degree Murder, Crime on an Indian Reservation, 18 U.S.C. Sec. 1152	02/24/2001	I
18 U.S.C. § 1201(a)(2)	Kidnapping Resulting in Death, Crime on an Indian Reservation, 18 U.S.C. Sec. 1152	02/24/2001	II

The defendant is sentenced as provided in pages 1 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform act of 1984.

☒ The defendant has been found not guilty on count(s) III, IV, V and VI

☐ Count(s) dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
585-27-0134

Defendant's Date of Birth:
11/20/1972

Defendant's USM No.:
21-413-0051

Defendant's Residence Address:
1103 Artiega Court
Los Lunes, NM 87031

Defendant's Mailing Address
(if different from residence):

9/19/2003
Date of Imposition of Judgment

/s/ **William P. Johnson**
Signature of Judicial Officer

Honorable William P. Johnson United States District Judge
Name and Title of Judicial Officer

9/26/2003
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of life.

This term is imposed as to each of Counts I and II; said terms will run concurrently.

The Court will not impose a term of supervised release as the defendant will be serving a life sentence.

The Court will make no ruling at this time on whether an upward departure should be imposed pursuant to U.S.S.G. 5K2.3, extreme conduct, since the Defendant will be serving a life sentence.

☒ The court makes the following recommendations to the Bureau of Prisons:

That placement of the Defendant be at a facility other than Florence, Co. The Court recommends the defendant participate in the Bureau of Prisons 500 hour drug and alcohol treatment program.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
☐ at ☐ a.m./p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments.

☐ Remitted

	Assessment	Fine	Restitution
Totals:	$200	$	$5,766.78

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

A ☒ in full immediately; or

B ☐ $ immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties:

Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

A special assessment of $100 is imposed as to each of Counts I and II, for a total of $200.

Pursuant to the Mandatory Victim Restitution Act of 1996, restitution in the amount of $5,766.78 shall be disbursed to the State of New Mexico Crime Victims Reparation Commission, 8100 Mountain Road NE, Suite 106, Albuquerque, New Mexico 87110-7822; CO: Diedra D. Restitution will be paid jointly and severely with the co-defendants in this case: Raidon Charles Begay, Docket No. 1:03 CR00029-001WPJ and Nicola Gabaldon, Docket No. 1:02CR01056-002WPJ.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as

directed by the court, the probation officer, or the United States attorney.

(2)

No. 04-1111

Supreme Court, U.S.
FILED
APR 8 - 2005
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In The

Supreme Court of the United States

FRANK GABALDON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERITORARI

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that an order be entered to rehear the previous order denying his writ of certiorari to review the judgment below.

GROUNDS FOR REHEARING

Petitioner Gabaldon presents the following brief and distinct intervening or other circumstances of a substantial and controlling effect compelling this Court to rehear the previous order denying his petition for writ of certiorari:

1. On February 14, 2005, petitioner Gabaldon filed a petition for writ of certiorari in this case.

2. The question presented in that petition for writ of certiorari was, "When the government presents no evidence that the victim was held for an appreciable period before she suffered a beating which immediately rendered her unconscious and caused her death, has the government proven the 'holding' element of a federal kidnapping charge under 18 U.S.C. § 1201(a) when it does not present any evidence the act of beating her involved any restraint beyond that inherent in her murder?"

3. On March 21, 2005, this Court denied the petition for writ of certiorari.

4. This petition for rehearing is timely, pursuant to Sup. Ct. R. 44.2, if filed on or before April 15, 2005.

5. In *United States v. Lentz*, No. 04-8107, on January 10, 2005, petitioner Lentz filed a currently pending petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit in *United States v. Lentz*, 383 F.3d 191 (4th Cir. 2004). Question presented number II in the Lentz petition is, "When the government presents no evidence of an unlawful physical or mental restraint of the victim or that the victim was confined for an appreciable period, but instead presents circumstantial evidence from which the jury could infer that the victim, after she traveled interstate alone, was murdered, has the government proven the 'holding' element of a federal kidnaping charge under 18 U.S.C. § 1201(a) when it does not present any evidence as to whether the act of killing the victim involved any restraint beyond that inherent in the act of killing her?".

6. The question presented by petitioner Gabaldon and question presented number II by petitioner Lentz present the same legal issue for review by this Court.

7. This Court has yet to enter an order either granting or denying petitioner Lentz's petition for writ of certiorari.

8. If this Court grants petitioner Lentz's petition for writ of certiorari and orders question presented number II of Lentz's petition for writ of certiorari be reviewed, this Court should rehear its previous denial of petitioner Gabaldon's petition for writ of certiorari.

9. Both petitioners Lentz and Gabaldon asserted that a reason to grant each petition for writ of certiorari was the significant circuit split on the essential "holding" element of the Federal Kidnapping Act, 18 U.S.C. § 1201(a).

10. The Solicitor General declined to file a response to Gabaldon's petition. Although Lentz's petition preceded Gabaldon's, the Solicitor General declined to file a response in Gabaldon, obtained an extension to respond to Lentz's petition, and filed a response on March 14. After this Court denied Gabaldon's petition on March 21, Lentz's petition was then distributed on March 24 for the Court's conference of April 15. This sequence of events effectively deemphasized the important fact that two contemporaneously pending petitions contained the identical legal issue.

11. If this Court orders that question presented number II of the Lentz petition for writ of certiorari be reviewed, that intervening circumstance will have the substantial and controlling effect of perpetuating the significant circuit split and stifling the uniformity of application of federal law if petitioner Gabaldon's petition for writ of certiorari containing the same question presented remains denied. This petition for rehearing relies on the intervening circumstances involved with Lentz's petition, and is filed to preserve the possibility that the two cases can be consolidated to consider the same legal issue under the test articulated in *Government of Virgin Islands v. Berry*, 604 F.2d 221 (3d Cir. 1979) in light of the unique circumstances in each case.

CONCLUSION

For the reasons given above, the previously filed petition for a writ of certiorari should be reheard and granted.

Respectfully submitted,

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April 8, 2005

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

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